In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1875

PACIFIC LEGAL FOUNDATION, *Petitioner,*

vs.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER IN OPPOSITION TO RESPONDENT'S SUGGESTION OF MOOTNESS

RONALD A. ZUMBRUN,
JOHN H. FINDLEY,
Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814.

SANDRA R. JOHNSON,
Associate Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814.
Counsel for Petitioner.

GLENN E. DAVIS,
Pacific Legal Foundation,
1990 M Street, N.W.,
Suite 550,
Washington, D.C. 20036.
Of Counsel.

PERNAU-WALSH PRINTING CO. - 255 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1875

PACIFIC LEGAL FOUNDATION, *Petitioner,*

vs.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER IN OPPOSITION TO RESPONDENT'S SUGGESTION OF MOOTNESS

I

INTRODUCTION

Rather than respond on the merits to the petition for *certiorari* of Pacific Legal Foundation (hereinafter PLF), respondent Environmental Protection Agency (hereinafter EPA) revoked the gasoline limitation regulations at issue and immediately thereupon, suggested to this Court that PLF's petition (No. 75-1875) is now moot. (EPA Brief in Opposition in No. 75-1919 and Suggesting Mootness in No. 75-1875 at 6.) The Court has asked the parties to brief the question of mootness.

As this Court declared in *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974):

> "The starting point for analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them.' North Carolina v Rice, 404 US 244, 246 (citation omitted) (1971). The inability of the federal judiciary 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" (Citations omitted.)

If a defendant, whose action has been challenged in court, voluntarily ceases that activity before final disposition of the case, the case does not automatically become moot. When the legality of the defendant's actions has been questioned, something still remains to be decided, *United States v. W. T. Grant Co.,* 345 U.S. 629, 632 (1953), and when it appears that there is a danger of recurrence of the facts as they existed before the defendant ceased his activity, case law indicates that the merits of the case may be reached by the courts. "The question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'"[1] *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122 (1974).

[1]The statutory mechanism for review of implementation plans (42 U.S.C. §1857h-5(b)(1)) appears to be a remedy in the nature of a declaratory relief.

In making this determination, the courts have traditionally examined the possibility of recurrence of the challenged action from two perspectives. *First,* can the defendant demonstrate "that there is no reasonable expectation that the wrong will be repeated"? *W. T. Grant, supra* at 633. *Second,* can it be shown that if the action is repeated, the impact will fall upon the same litigants? *State Highway Commission v. Volpe,* 479 F.2d 1099, 1106 (8th Cir. 1973). *See also,* Note, Mootness on Appeal, 83 Harv. L. Rev. 1672, 1682-1685 (1970).

This brief undertakes to examine the application of these two questions to the situation existing in the present case.

II

EPA HAS NOT DEMONSTRATED THAT THERE IS NO REASONABLE EXPECTATION THAT THE GASOLINE LIMITATION REGULATIONS WILL BE REISSUED

Case law has placed the burden of showing mootness with the defendant. "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' [Footnote omitted.] The burden is a heavy one." *W. T. Grant, supra* at 633.

In *United States v. Phosphate Export Asso.,* 393 U.S. 199, 203 (1968), this Court reiterated the principles stated in *W. T. Grant:*

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if

it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' [Citation omitted.] A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes. . . ."

In the present case, EPA has revoked the gasoline regulations on the basis that it has no desire to implement them because of their seriously disruptive nature and on the belief that Congress does not desire that they be implemented. EPA Brief, Appendix A at 7-9. Although the Administrator offers no assurances that similar regulations will not be reissued, his statement that EPA has no desire to implement the regulation may well be an assurance that it will not actively seek to renew this action.

The decision regarding such regulation is not solely under the Administrator's control. Until Congress does act, it is apparent from EPA's previous posture in this case that it has interpreted the Clean Air Act so as to allow it to issue the gasoline limitation regulations. The initial regulations promulgated by EPA for California were drawn up under court order. *See Riverside v. Ruckelshaus,* 4 E.R.C. 1729 (1972). Under these circumstances, without a definitive change in law, it is possible that EPA will again be put into

a position in which it feels it must reissue similar regulations.

The Administrator of EPA has asserted throughout this case that he has the authority under present law to issue the gasoline limitation regulations. Indeed, a major reason given for revoking the regulations is that the law the Administrator alleges gives him authority to make the regulations is expected eventually to be changed. EPA Brief, Appendix A at 8-9. If the present law is not changed, it appears that the Administrator will again consider himself free to reissue the regulations.

A new Congress and a new Administration have been elected. Whether the new Congress will act as the Administrator judged the old body desired to, or whether the new Administration will follow the same policy as the old, are questions incapable of determination at this time. These factors lend support to PLF's belief that questions regarding the validity of the gasoline limitation regulations remain very much alive.

III

EPA COULD REINSTATE THE GASOLINE LIMITATION REGULATIONS AT ANY TIME

In *Local No. 806, Oil Workers International Union v. Missouri,* 361 U.S. 363 (1960), plaintiff questioned the constitutionality of a state law which allowed the governor "to take possession of and operate a public utility affected by a work stoppage when in his opin-

ion 'the public interest, health and welfare are jeopardized' . . . ." *Id.* at 364. By the time the case came up for final decision, the strike and seizure which had prompted the lawsuit were over. This Court found the case moot.

The decision in *Oil Workers* is explained by this Court in *Super Tire, supra* at 122-123:

> "In both Harris [v. *Battle,* 348 U.S. 803 (1954)] and Oil Workers a state statute authorized the Governor to take immediate possession of a public utility in the event of a strike or work stoppage that interfered with the public interest. The seizure was not automatic for every public utility labor dispute. It took effect only upon the exercise of the Governor's discretion. In each case the Court held the controversy to be moot because both the seizure and the strike had terminated prior to the time the case reached this Court. The governmental action challenged was the authority to seize the public utility, and it was clear that a seizure would not recur except in circumstances where (a) there was another strike or stoppage, and (b) in the judgment of the Governor, the public interest required it. The question was thus posed in a situation where the threat of governmental action was two steps removed from reality. This made the recurrence of a seizure so remote and speculative that there was no tangible prejudice to the existing interests of the parties and, therefore, there was a 'want of a subject matter' on which any judgment of this Court could operate."

This Court, in *Super Tire,* distinguished the situation there presented and held that case not moot. In

Super Tire, the Court found that although the strike which had engendered the suit had ended, the controversy remained alive since the statute questioned would take effect immediately without the discretionary act of any official. *Id.* at 123.

The present case appears to lie somewhere between the extremes presented by *Oil Workers* and *Super Tire.* The immediate activity (regulation) which brought about this lawsuit has ceased. Unlike the *Oil Workers* situation, however, only one event need occur before the situation which began the lawsuit re-occurs—the action of EPA in reissuing the regulations. However, unlike *Super Tire,* a discretionary act of an official, again the reissuing of the regulation, is necessary before the facts are the same as they were before the cessation of the inciting activity.

The case at bar more closely resembles *Motor Coach Employees v. Missouri,* 374 U.S. 74 (1963), wherein plaintiffs again challenged the statute at issue in *Oil Workers.* In *Motor Coach Employees,* a strike was in progress, however, the governor had terminated his seizure of the public utility. This Court refused to find the case moot:

> "There . . . exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act [which authorized seizure] in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act. Cf. Southern P. Terminal Co v Interstate Commerce Com. 219 US 498, 514-516 . . . United States v W. T. Grant Co. 345 US 629, 632 . . ." *Id.* at 78.

In the case at bar, the Clean Air Act remains unchanged by Congress. Defendant maintains that it has authority under the Act to issue gasoline limitation regulations, while plaintiff asserts it does not. This indicates "the presence of an existing unresolved dispute" as in *Motor Coach Employees. Id.* Further, in *Motor Coach Employees,* as in the present case, the challenged action involves the discretion of one government official which could at any time be exercised to return the parties to direct confrontation.

IV

IF THE GASOLINE REGULATIONS ARE REINSTATED THEIR IMPACT WILL FALL UPON PETITIONER

In cases in which a private defendant alleges mootness against a government plaintiff because of the cessation of the activity which has precipitated the lawsuit, the court generally presumes the same parties will again be affected if the activity recurs. This is true because the government is usually seeking enforcement of the law and is equally affected any time allegedly illegal conduct by a private defendant occurs. In suits against the government, however, it cannot be presumed that a private litigant will be affected if the activity which has ceased before a final disposition of the case is renewed. (*See* Note, Mootness on Appeal, *supra* at 1683.) Therefore, in cases of this nature, the lower federal courts have often stressed the need for assurance that the same parties will again be affected if the terminated action begins again.

State Highway Commission v. Volpe, supra; Alton & So. Ry. Co. v. International Ass'n of Mach. & A. W., 463 F.2d 872, 881 (D.C. Cir. 1972); *Committee to Free the Fort Dix 38 v. Collins,* 429 F.2d 807, 812 (3d Cir. 1970).

However, the views of this Court on the requirement for such assurances are somewhat uncertain. In several cases dealing with the mootness issue between private plaintiff and public defendant, this Court has tended to stress the need to question the likelihood of recurrence but has not required a separate and definitive showing that the same plaintiff will certainly be involved again.

In *Gray v. Sanders,* 372 U.S. 368 (1963), a voter sought an injunction and declaratory relief challenging certain Georgia statutes dealing with the method of counting votes in a Democratic primary for the nomination for United States Senator and other offices. Before the final resolution of the case, the Democratic Committee voted to hold the 1962 primary on a popular vote basis, rather than on the method challenged. This Court reasoned that this voluntary action did not moot the case.

> "Moreover, we think the case is not moot by reason of the fact that the Democratic Committee voted to hold the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply

> rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to . . . [their] old ways.' United States v W. T. Grant Co. 345 US 629, 632, 97 L ed 1303, 1309, 73 S Ct 894." *Id.* at 375.

Although this action involved a private party versus the government, this Court did not mention the necessity for proof that the specific plaintiffs would be affected if the state action were again commenced.

A somewhat similar situation was presented in *Super Tire* wherein private plaintiffs challenged a state statute which allowed welfare benefits to striking workers. By the time the case was to be decided the strike involving plaintiffs had ceased and with it the challenged activity of welfare payments. This Court found that the case was not moot in that, among other things, the likelihood of government action continued since the statute remained in effect to be used if and when a new strike occurred. At no point did this Court mention the necessity that the private plaintiffs who were employers, show that in a new case they would be affected. Of course, in *Super Tire,* the existence of the challenged statute could influence workers in their collective bargaining negotiations. *Id.* at 124.

If this analysis is correct, it appears that this Court does not require a separate showing of certain effects on particular plaintiffs if the facts of the case make clear that plaintiffs will indeed be involved if the activity begins anew or if a residuum of government activity remains.

In *DeFunis v. Odegaard, supra,* another case in which a private party challenged government action, this Court, in dictum, plainly ignored the necessity that the private plaintiff show that the activity which had ceased would affect it if renewed.

> "There is a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' [Citations omitted.] *These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the admissions procedures of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance 'that "there is no reasonable expectation that the wrong will be repeated."'* United States v W. T. Grant Co. supra, at 633 (citation omitted). Otherwise, '[t]he defendant is free to return to his old ways,' id., at 632 (citation omitted) and this fact would be enough to prevent mootness because of the 'public interest in having the legality of the practices settled.' Ibid. But mootness in the present case depends not at all upon a 'voluntary cessation' of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled." *Id.* at 318. (Emphasis added.)

This language, which was unnecessary for the decision, appears quite startling, since in *DeFunis,* it was obvious that the plaintiff would have been unable to show future affect if this had been a "voluntary cessation" case.

If the approach taken by this Court in *DeFunis, Super Tire* and *Gray v. Sanders* indicates a trend to abandon the requirement that private plaintiffs show to a certainty they will be affected by recurrent government action, PLF's discussion of mootness could be limited to a review of EPA's assertions of nonreissuance of the gasoline regulations. However, neither *DeFunis, Super Tire* nor *Gray v. Sanders* explicitly spoke to the "certainty of affect" requirement and the finding of not moot in *Super Tire* can be explained on numerous grounds. *Id.* at 122-127. Therefore, it is necessary to examine whether or not, in the light of well established case law, petitioner will need to or be able to show its continued interest if EPA were to reissue the gasoline limitation regulations.

The necessity that private plaintiffs show a continuing interest in challenged government action has definitely been abandoned in a series of federal cases originating from this Court's decision in *Southern P. Terminal Co. v. Interstate Commerce Comm'n,* 219 U.S. 498, 516 (1911). Therein the Court stressed the *public interest* in the case presented by the private party and allowed the case to go forward without requiring proof that the specific plaintiffs would be affected if the government reinstated the order about

which the plaintiffs complained. The *Southern Pacific Terminal* line of cases, however, which has stressed the public interest, rather than plaintiff's continued involvement in a case, has in large part been limited to situations in which the government action is "capable of repetition, yet evading review." *Id.* at 515. *See* Note, Mootness on Appeal, *supra* at 1685-1686.

The present case would fit within this standard if EPA were again to issue a gasoline rationing regulation scheduled to go into effect by May 1977. Even if a new time table is enacted by Congress, it is not unlikely that the resolution of a future challenge could be as long delayed as the present one.

Petitioner in the present case, however, is not a sole party representing only its own interests. Rather, it is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation on behalf of California citizens in matters affecting the public interest. In the case at bar, petitioner seeks to represent the interests of its members, contributors and supporters who own or use vehicles which rely on gasoline. It is certain that these members, contributors and supporters will continue to be affected by any new actions on the part of defendant which seek to limit the gasoline supplies to California.

V

PUBLIC INTEREST REQUIRES A DECISION ON THE MERITS

A claim of public interest in the questions presented by the litigation will not alone save a case from a determination of mootness. *DeFunis, supra* at 316. However, "[w]hen the court views the public interest as greater a lesser possibility of repetition may suffice . . . ." *Alton & So. Ry. Co. v. International Ass'n of Mach. & A. W., supra* at 880.

There can be little question that litigation dealing with the Clean Air Act presents issues of immense public interest. The interests of the public in a definitive resolution of the validity of the gasoline limitation regulations should prompt this Court to rule on the merits of this case.

VI

CONCLUSION

In that respondent EPA has not carried its burden of proof that the revoked gasoline limitation regulations will not be reissued and petitioner PLF has demonstrated that a reissuance of such regulations will fall upon it and its members, PLF suggests that the criteria for mootness have not been met. Petitioner believes that the more appropriate disposition

would be to grant *certiorari* and summarily reverse the decision of the court of appeals.

Respectfully submitted,

RONALD A. ZUMBRUN,
JOHN H. FINDLEY,
Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
SANDRA R. JOHNSON,
Associate Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,
Counsel for Petitioner.

GLENN E. DAVIS,
Pacific Legal Foundation,
1990 M Street, N.W.,
Suite 550,
Washington, D.C. 20036,
Of Counsel.

November, 1976